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Chong Siew Choong v Public Prosecutor

HIGH COURT (JOHOR BAHRU) — MISCELLANEOUS CRIMINAL APPLICATION NO 44–11 OF 1996
ABDUL MALIK ISHAK J
B 6 MAY 1996

Criminal Procedure *— Jurisdiction — Inherent powers to deal summarily with miscellaneous criminal applications — Whether exercisable where there are express provisions of law*

C ***Criminal Procedure*** *— Miscellaneous criminal applications — Whether intitulment necessary*

Criminal Procedure *— Transfer of cases — Application for early trial date before different resident High Court judge — Whether a High Court judge can transfer a criminal trial to or from his own court from or to another resident High Court judge's* D *court — Courts of Judicature Act 1964 ss 3 & 20*

On 16 February 1995, the applicant was arrested for alleged involvement in a murder case and was subsequently detained in prison without bail pending trial. The applicant was 17 years old at the time of his arrest and it was contended that his continued E incarceration would result in him coming into contact with hardened criminals. The applicant's counsel wrote a letter to the court which was assigned the case ('High Court No 1') to obtain an early trial date. The court advised the applicant's counsel that it could not fix an early trial date without the deputy public prosecutor's consent to amend the charge. The applicant then filed this application before F this court ('High Court No 2') seeking (i) an early trial date in High Court No 1; (ii) if High Court No 1 could not give an early trial date, the case be transferred to High Court No 2 to obtain an early trial date there; (iii) if High Court No 2 could not give an early trial date, the case be transferred to High Court No 3 to obtain an early trial G date there. The issue before the court was whether it could encroach upon the territory of High Court No 1 and whether it had the power to transfer proceedings to High Court No 3.

Held, dismissing the application:

H (1) Section 20 of the Courts of Judicature Act 1964 ('the Act') gives an absolute power to the Chief Judge to distribute business among the judges of the High Courts in accordance with the directions which he may give of a general or particular nature. In construing s 20 of the Act, the inescapable conclusion was that only the Chief Judge could direct the judge of High Court No 2 I ('J2') to take and dispose of the case from the judge of High Court No 1 ('J1') (see p 71 A, F).

(2) Miscellaneous criminal applications have to be intituled just like originating summonses (see p 73B); *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 followed.

(3) The inherent powers of the High Court cannot be exercised to override or circumvent the express provisions of law and therefore the court was fully bound by s 20 of the Act (see p 73H); *Abdul Sali v Najima Begum* [1980] Cr LJ 232 (All) followed.

[Bahasa Malaysia summary

Pada 16 Februari 1995, pemohon telah ditangkap untuk penglibatan yang dikatakan dalam suatu kes pembunuhan dan telah selepas itu ditahan dalam penjara tanpa jaminan sementara menunggu perbicaraan. Pemohon berumur 17 tahun pada waktu penangkapannya dan adalah ditegaskan bahawa penerusan pemenjaraannya akan menyebabkannya bertemu dengan penjenayah-penjenayah yang tidak berhati perut. Peguam pemohon telah menulis surat kepada mahkamah yang telah diperuntukkan kes itu ('Mahkamah Tinggi No 1') untuk memperolehi suatu tarikh perbicaraan awal. Mahkamah telah menasihatkan peguam itu bahawa ia tidak boleh menetapkan tarikh perbicaraan awal tanpa persetujuan penolong pendakwa raya untuk meminda pertuduhan. Pemohon kemudiannya memfailkan permohonan ini di hadapan mahkamah ini ('Mahkamah Tinggi No 2') memohon (i) suatu tarikh perbicaraan awal di Mahkamah Tinggi No 1; (ii) jika Mahkamah Tinggi No 1 tidak dapat memberi tarikh perbicaraan awal, kes dipindahkan ke Mahkamah Tinggi No 2 untuk memperolehi tarikh perbicaraan awal di situ; (iii) jika Mahkamah Tinggi No 2 tidak dapat memberi tarikh perbicaraan awal, kes dipindahkan ke Mahkamah Tinggi No 3 untuk memperolehi tarikh perbicaraan awal di situ. Isu di hadapan mahkamah adalah sama ada ianya boleh menceroboh atas kawasan Mahkamah Tinggi No 1 dan sama ada ia mempunyai kuasa untuk memindahkan prosiding kepada Mahkamah Tinggi No 3.

Diputuskan, menolak permohonan itu:

(1) Seksyen 20 Akta Mahkamah Kehakiman 1964 ('Akta itu') memberikan suatu kuasa mutlak kepada Ketua Hakim untuk mengedarkan urusan-urusan di antara hakim-hakim Mahkamah Tinggi mengikut arahan-arahan am atau khas yang diberinya. Dalam pentafsiran s 20 Akta itu, kesimpulan ternyata adalah bahawa hanya Ketua Hakim boleh mengarahkan hakim Mahkamah Tinggi No 2 ('J2') untuk mengambil dan menyelesaikan kes daripada hakim Mahkamah Tinggi No 1 ('J1') (lihat ms 71A, F).

(2) Permohonan pelbagai jenayah mesti ditajukkan sama seperti suatu saman pemula (lihat ms 73B); *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 diikut.

(3) Kuasa sedia ada Mahkamah Tinggi tidak boleh digunakan untuk menolak atau mengelak peruntukan-peruntukan undang-undang yang nyata dan oleh demikian mahkamah adalah terikat sepenuhnya oleh s 20 Akta itu (lihat ms 73H); *Abdul Sali v Najima Begum* [1980] Cr LJ 232 (All) diikut.

Notes

For cases on transfer of cases, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1603–1607, 2798–2827.

Cases referred to

A-G v Noyes (1881) 8 QBD 125
A-G v Sillem (1864) 2 H & C 431
AK Gopalan v The State of Madras AIR 1950 SC 27
Abdul Sali v Najima Begum [1980] Cr LJ 232 (All)
Barnes v Jarvis [1953] 1 WLR 649
Bird v Jones (1872) 7 QB 742; 15 LJQB 82
Capper & Anor v Baldwin [1965] 2 QB 53
Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457
Gluchowska v Tottenham Borough Council [1954] 1 QB 439
Hornsey LB v Monarch Investment Building Society (1889) 24 QBD 1
IRC v Collco Dealings, IRC v Lucbor Dealings [1959] 1 WLR 995
King Emperor v Abhariraj Kunwar AIR 1940 Oudh 8; 40 Cr LJ 841
M'Cowan v Baine [1891] AC 401
Salomon v Salomon [1897] AC 22
Sutters v Briggs [1922] AC 1
Warburton v Loveland (1832) 2 D & C (HL) 480

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 304, 388(i)
Courts of Judicature Act 1964 (Act 91) ss 3, 20

RK Menon (*RK Menon & Co*) for the applicant.
Azman Abdullah (Deputy Public Prosecutor) for the respondent.

Abdul Malik Ishak J: This was a miscellaneous criminal application in encl 2 accompanied by a notice of motion wherein the applicant sought for the following prayers:

(1) Satu tarikh yang awal ditetapkan untuk perbicaraan Mahkamah Tinggi Johor Bahru Perbicaraan Jenayah No 45–7 tahun 1995;

(2) Jikalau didapati bahawa tidak dapat tarikh awal di Mahkamah Tinggi No 1, maka kes berkenaan dipindahkan ke Mahkamah Tinggi No 2 untuk mendapatkan tarikh awal di situ;

(3) Sekiranya tidak ada tarikh awal di Mahkamah Tinggi No 2 juga, maka kes berkenaan dipindah ke Mahkamah Tinggi No 3 untuk mendapatkan satu tarikh awal daripada Mahkamah Tinggi No 3;

(4) Lain-lain perintah atau perintah-perintah yang Mahkamah mulia ini dapati sesuai dan adil.

There are four observations to be made. Firstly, there are three High Courts of Malaya comprised in Johor, particularly Johor Bahru, manned by three resident High Court judges. The senior resident High Court judge will be in charge of High Court No 1. This is the privilege accorded to him. The next senior High Court judge will control and take charge of High Court No 2, while the junior and not necessarily the youngest, will

be in charge of High Court No 3. That would be the hierarchy of the three High Courts of Malaya at Johor Bahru. For convenience, the three resident High Court judges will be referred to as J1, J2 and J3 having regard to their seniority and to the High Courts of which they are in charge. Secondly, all businesses of the three High Courts are evenly distributed on equal basis dependent on the numbers allotted to these courts and the registries would distribute the work load according to the numbers as pre-determined. To date, the registries have done a marvellous job and, from time to time, J1 will re-allot new numbers to the three High Courts. Thirdly, J1, J2 and J3 have no choice but to handle those cases distributed by the registries and whether those cases would be fixed for early hearings would in turn be dependent on the respective High Court judges who would normally determine the hearing dates through their respective deputy registrars. Fourthly, I am J2 in charge of High Court No 2.

The applicant's father by the name of Chong Liow Meng affirmed an affidavit dated 13 April 1996 in encl 4 and there he narrated in great detail the facts in support of the application in encl 2. It was deposed that the applicant was arrested on 16 February 1995 for alleged involvement in a murder case that took place in an area along Jalan Tanah Merah, Kampong Semai Subor, Tasek Utara, Johor Bahru. Two other Chinese youngsters were said to be involved and they too were arrested and detained. The applicant together with the other two Chinese youngsters were duly produced before the Magistrate's Court, Johor Bahru vide Magistrate's Court Johore Bahru Case No A81–1 of 1995 on several occasions, namely, on 27 February 1995, 20 April 1995, 20 May 1995, 5 June 1995 and on 12 June 1995 when the case was finally transmitted to High Court No 1 vide Criminal Trial No 45–7–95 without the necessity of a preliminary inquiry. The committal proceedings against the applicant and the two other Chinese youngsters showed the following tentative charge:

> Bahawa kamu bersama-sama pada 15 Februari 1995 jam lebih kurang 1.15 petang, di kawasan Jalan Tanah Merah, Kampong Semai Subur, Tasek Utara, di dalam daerah Johor Bahru, di dalam Negeri Johor dan dengan niat bersama telah melakukan kesalahan bunuh dengan menyebabkan kematian Liew Chin Liu K/P A3964769(B), dan dengan demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan (NMB Bab 45) dibaca bersama-sama dengan seksyen 34 Kanun yang sama.

Bail was denied not only to the applicant but also to the other two Chinese youngsters. The applicant was born on 21 March 1977 and, consequently, when he was arrested on 16 February 1995, he was barely 17 years 10 months 25 days. Under the First Schedule to the Criminal Procedure Code (FMS Cap 6) ('the CPC') an offence of murder of which the applicant is subjected to is classified as non-bailable. In *King Emperor v Abhairaj Kunwar* AIR 1940 Oudh 8; 40 Cr LJ 841, it was held that in a murder case, where there are prima facie grounds for believing that the accused has committed the offence which is punishable with death or with imprisonment for life, the accused should not be released on bail. Under s 388(i) of the CPC, the applicant is not entitled to be released on bail and this prompted Mr RK Menon, the learned counsel for the applicant, to

advance an argument that continued detention in the Johor Bahru prison would probably result in the applicant coming into contact with hardened criminals who have been incarcerated there. It was emphasized that the applicant was studying in Form 5 in Sekolah Menengah Tasek Utara, Jalan Tun Abdul Razak Susur 7, Johor Bahru and that, as a keen student, he was particularly interested in pursuing his studies. The learned deputy public prosecutor in the person of Mr Azman Abdullah took exception and he strenuously argued at the Bar that he had evidence to show that the applicant was not a keen student; that there were teachers at the school who witnessed the incident and without affidavits from these teachers, this court was deprived of the opportunity to ascertain whether the applicant was indeed a studious pupil. Nevertheless, the applicant's father deposed further in the affidavit that he had instructed his solicitors to write to J1 to seek an early date for the hearing of the applicant's case. Thus, by letter dated 23 January 1996, Mr RK Menon wrote a long passionate letter to J1 begging for an early hearing date for the applicant as the applicant's father was apprehensive that at a later stage when the case finally came up for hearing and after the applicant had been detained for a prolonged period, the prosecution may decide to tender an amended charge under s 304 of the Penal Code. In that letter to J1, Mr RK Menon drove home the point that continued incarceration of the applicant pending trial would be disastrous in that the applicant may absorb all sorts of undesirable habits and negative values. J1's senior assistant registrar ('the registrar') by letter dated 31 January 1996 as exhibited in exh 'CLM4' in encl 4 replied to Mr RK Menon's letter as adverted to earlier and for convenience, the registrar's reply is reproduced hereinunder:

Pejabat Pendaftaran
Mahkamah Tinggi
80000 Johor Bahru

Telefon: 07–2230024
Ruj Kami: 45–7–95
Tarikh: 31 Januari 1996

Tetuan RK Menon & Co
Peguambela & Peguamcara
Rooms 5, 6, & 7, 6th Floor
Foh Chong Building
Jalan Ibrahim
80000 JOHOR BAHRU

Tuan

Per: Mahkamah Tinggi Johor Bahru
Perbicaraan Jenayah No 45–7–95

Kami merujuk kepada perkara di atas dan surat daripada pihak tuan bertarikh 23 Januari 1996.

2 Atas arahan, pihak tuan adalah diminta supaya berhubung dengan pihak Pendakwaraya Negeri Johor terlebih dahulu mengenai kes ini.

3 Pihak Mahkamah tidak dapat menetapkan tarikh bicara yang awal melainkan pihak Pendakwaraya Negeri Johor menyatakan persetujuannya untuk meminda pertuduhan ke atas seksyen 304 Kanun Keseksaan atau tidak.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

—Sgd—

(JAILANI BIN RAHMAN)

Penolong Kanan Pendaftar,

Mahkamah Tinggi,

Johor Bahru

J1's registrar's letter revealed two things. Firstly, Mr RK Menon was advised to revert to the deputy public prosecutor with regard to the case (Criminal Trial No 45–7–95). Secondly, J1's Court was not able to fix an early trial for the case (Criminal Trial No 45–7–95) unless the deputy public prosecutor agreed to amend the charge to s 304 of the Penal Code. There was no mention at all in the registrar's letter that J1's court had other outstanding criminal cases pending. But the applicant's father at para 14 of his affidavit in encl 4 deposed, inter alia, that:

> Saya diberitahu oleh peguam saya bahawa Mahkamah Tinggi No 1 Johor Bahru ada banyak kes untuk dibicarakan dan kes-kes ini telah pun didaftarkan terlebih awal apabila dibandingkan dengan kes terhadap anak saya.

Now, to recapitulate, the prayers in the notice of motion in encl 2 filed under the guise of miscellaneous criminal application sought for:

(1) an early trial for the applicant's case (Criminal Trial No 45–7–95) — a case scheduled and slotted before J1;

(2) if J1 could not give an early trial, the case to be transferred to J2;

(3) if J2 could not give an early trial, the case to be transferred to J3; and

(4) any other directions or orders as the Honourable Court deems fit to grant.

Am I supposed to accede to the applicant's application? Mr Azman Abdullah, the learned deputy public prosecutor, argued quite rightly that I am not supposed to encroach into the territory of J1, so to speak. I hasten to add, neither do I have the inclination to encroach into J3's territory. It is germane to mention here that I too, do not have the power to transfer Criminal Trial No 45–7–95 to J3's court. The pertinent question to ask is this: Why must this application be filed in my court? Is it because I have disposed of all my criminal cases that prompted this application to be filed in my court? Section 20 of the Courts of Judicature Act 1964 (Act 91) ('the Act') enacts that:

> The distribution of business among Judges of the High Court shall be made in accordance with such directions, which may be of a general or a particular nature, as may be given by the Chief Judge.

A 'Chief Judge' is defined under s 3 of the Act to mean the Chief Judge of the High Court in Malaya. In my opinion, s 20 of the Act gives an absolute power to the Chief Judge to distribute 'business' among judges of the High Courts in accordance with the directions which he may give of a general or particular nature. The word 'business' employed in the context of s 20 of the Act must necessarily refer to the 'cases' filed before the High Courts as the hearing of such cases are the only 'business' conducted by these High Courts. It is a correct approach to adopt when construing an Act of Parliament by construing the intention as expressed in the Act itself. Put differently, it is appropriate to say that the function of the court is to interpret an Act 'according to the intent of them that made it' and the intention must be deduced from the language used: per Parker CJ in *Capper & Anor v Baldwin* [1965] 2 QB 53 at p 61. In my judgment, the words employed in s 20 of the Act are by themselves precise and unambiguous and, consequently, my job is simply to expound those words in the ordinary and natural sense. As Lord Goddard CJ once said in *Barnes v Jarvis* [1953] 1 WLR 649 at p 652 (DC): 'A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.'

There is a string of authorities which say that 'where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case, the words of the statute speak the intention of the legislature' (*Warburton v Loveland* (1832) 2 D & C (HL) 480 at p 489; *A-G v Sillem* (1864) 2 H & C 431 at p 510; *A-G v Noyes* (1881) 8 QBD 125 at p 139; *Hornsey LB v Monarch Investment Building Society* (1889) 24 QBD 1; *M'Cowan v Baine* [1891] AC 401 at p 409; *Salomon v Salomon* [1897] AC 22 at p 38; *Sutters v Briggs* [1922] AC 1, 8; *IRC v Collco Dealings, IRC v Lucbor Dealings* [1959] 1 WLR 995; and *Gluchowska v Tottenham Borough Council* [1954] 1 QB 439 (DC)), and, consequently, in construing s 20 of the Act, I arrived at the inescapable conclusion that only the Chief Judge could direct me to take and dispose of Criminal Trial No 45–7–95 from J1 and, without the Chief Judge's direction on this point, I will not encroach into J1's territory, so to speak. For fear of repetition, I lay stress on the fact that the Chief Judge has that overriding power and it is also his prerogative to transfer Criminal Trial No 45–7–95 to J3. I have no powers of the like nature. Accordingly, I refused to grant the prayers in encl 2.

But that is not the end of the matter. Mr Azman Abdullah next argued with vigour and vitality that if I were to accede to the prayers in encl 2, especially prayers (1) and (2), the floodgates would be opened wherein prisoners awaiting trials before J1 and J3 would proceed to apply to have their cases transferred to my court in their endeavours to obtain early trial dates. There is merit in this argument. Why should I be saddled with the cases from J1 and J3 unless the Chief Judge under s 20 of the Act directed me to do so? All High Court judges receive the same salaries, perks and entitlements and they should perform at optimum levels. In the administration of the law, it is often too tempting to seek escape from the burden of listening to a case, be it civil or criminal. If such an attitude prevails, then the courts would fail to serve as an instrument of law and order. It would fail to meet the problems of contemporary society. In my considered view, the courts must aspire at certainty, at justice, at

progressiveness, at steadfastness. That would be possible if judges adjudicate cases speedily and judiciously. Be that as it may, every non-bailable prisoner expects an early trial. To be incarcerated in prison for slightly more than one year must be an ordeal. More so in the case of the applicant who was a juvenile at the time of his arrest. It saps the strength of even the strong among us. In this context, I am not unmindful of the words of their Lordships of the Indian Supreme Court in *AK Gopalan v The State of Madras* AIR 1950 SC 27, especially the words of BK Mukherjea J, and, I reproduce those words as they merit reproduction:

> There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. The possession and enjoyment of all rights, as was observed by the Supreme Court of America in *Jacobson v Massachusetts* 197 US 11, are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community. The question, therefore, arises in each case of adjusting the conflicting interests of the individual and of the society. In some cases, restrictions have to be placed upon free exercise of individual rights to safeguard the interests of the society; on the other hand, social control which exists for public good has got to be restrained, lest it should be misused to the detriment of individual rights and liberties. Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. No man's liberty would be worth its name if it can be violated with impunity by any wrongdoer and if his property or possessions could be preyed upon by a thief or a marauder. The society, therefore, has got to exercise certain powers for the protection of these liberties and to arrest, search, imprison and punish those who break the law. If these powers are properly exercised, they themselves are the safeguards of freedom, but they can certainly be abused. The police may arrest any man and throw him into prison without assigning any reasons; they may search his belongings on the slightest pretext; he may be subjected to a sham trial and even punished for crimes unknown to law. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.

In another part of the same judgment, BK Mukherjea J continued in serious vein:

> The right to the safety of one's life and limbs and to enjoyment of personal liberty, in the sense of freedom from physical restraint and coercion of any sort, are the inherent birth rights of a man. The essence of these rights consists in restraining others from interfering with them and hence they cannot be described in terms of 'freedom' to do particular things.

In *Bird v Jones* (1872) 7 QB 742; 15 LJ QB 82, Coleridge J said that 'it is one part of the definition of freedom to be able to go whithersoever one pleases.'

The courts must therefore strike a balance to ensure that non-bailable prisoners who have had their freedom curtailed for the good of

society should not linger for too long a time in prison while awaiting for trials. If these non-bailable prisoners are not found guilty later on after undergoing trials, it would surely be a waste of public funds to incarcerate them. Early trials would ensure justice be meted out to the non-bailable prisoners and, consequently, reduce the overcongested prisons throughout the country. Be that as it may, Mr Azman Abdullah further argued and drew my attention to the failure of Mr RK Menon to cite the sections of the law in the intitulement to the miscellaneous criminal application in encl 2. Just like originating summonses have to be intituled, so too would miscellaneous criminal applications. By way of an analogy Gopal Sri Ram JCA in *Cheow Chew Khoon (t/a as Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 at p 477 spoke of the mandatory requirement for an originating summons to be intituled :

> The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support, one would come to the conclusion that it is not an application made under O 89. The summons does not, as I observed very early in this judgment, state any particular rule of court in its intitulement. Now, I think that that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation. If the submission of counsel be the law, then it is wrong. But I am firmly of the view that it is not.
>
> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise, it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

In rebuttal, Mr RK Menon argued that this court has the inherent powers to deal summarily with this miscellaneous criminal application. I beg to disagree. In *Abdul Sali v Najima Begum* (1980) Cr LJ 232 (All) it was held that the inherent powers of the High Court cannot be exercised to override or circumvent the express provisions of law. Applying *Abdul Sali*, I am constrained to say that I cannot override or circumvent s 20 of the Act and I am fully bound by it. For these reasons, I refused to grant the prayers as sought for in encl 2.

Application dismissed.

Reported by Ng Kian Pin